Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Fourth Circuit's approach in analyzing the important financial factor with respect to Eleventh Amendment immunity created and sharpened a conflict among the Circuits regarding the proper approach to be utilized in examining this factor which must be resolved by the Supreme Court?

2. Is an actual financial examination of the circumstances of the case the proper approach to be utilized in assessing the important financial factor in an Eleventh Amendment immunity analysis?

3. When correctly analyzed, is the Ports Authority entitled to Eleventh Amendment protection?

LIST OF PARTIES AND RULE 29.1 LIST

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The petitioners, Fred W. Ristow and Susan M. Ristow, pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court

of Appeals for the Fourth Circuit entered in this action on June 13, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 27 F. 3d 84 (4th Cir. 1994). It is reprinted in the appendix ("App.") at A1-30. The District Court's unpublished decision and order granting dismissal is reprinted at App. B1-6.

JURISDICTION

The Court of Appeals entered judgment on June 13, 1994. This petition for writ of certiorari was filed within 90 days of that date, and this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Sec. 1254 (1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision in-

volved is the Eleventh Amendment of United States Constitution, which is set forth at App. C1. The state statutes involved are numerous provisions contained in Section 54, Chapter 3, Articles 1 through 11 of the South Carolina Code Ann. These are set forth at App. C2-54.

STATEMENT OF THE CASE

A. THE PARTIES

The petitioners, Fred W. Ristow and Susan M. Ristow, hereinafter referred to as "Ristows" or "petitioners", are husband and wife and citizens of the State of Wisconsin. At all times material to this action, Fred W. Ristow was employed as a long haul truck driver and longshoreman by Donald Fanetti Trucking of Franklin, Wisconsin. (App. D3, 7)

The respondent, South Carolina

State Ports Authority, hereinafter referred to as the "Ports Authority", "Authority," or "respondent", is statutorily defined as an instrumentality of the State of South Carolina and is engaged in the business of managing and developing the ports and harbors in the State. See S.C. Code Ann., Sec. 54-3-130 at App. C6-10. The Ports Authority has the highly autonomous powers of a body corporate, including the power to sue and be sued, own property in its own name, borrow money, pay its expenses, etc. See S.C. Code Ann., Sec. 54-3-140 and Sec. 54-3-1020 at App. C10-18, 52-53.

The respondent designated in the caption as "The SS Unknown" is an unknown ship which was never identified and served. (App. A3) It was ulti-

mately dismissed as a defendant, and the Ristows did not appeal that dismissal.

B. THE INCIDENT IN QUESTION

On December 20, 1988, Fred W. Ristow, in the course of his employment as a truck driver for Fanetti Trucking, had transported a load of steel pipe on a flat bed truck to the Ports Authority's terminal in Charleston, South Carolina. (App. D8-9) Such pipe was to be picked up later at the terminal by an unknown ship and transported to Venezuela. (App. D9) While Mr. Ristow was standing on top of the load of pipe on the flat bed trailer and assisting in the unloading process, a fork lift driver employed by the Ports Authority, with Mr. Ristow in full view, picked up the entire load of pipe with the fork lift, lost control of the load while traveling in Mr. Ris-

tow's direction, and dropped one bundle of pipe. (App. D10-11) Mr. Ristow had to jump from the truck to avoid fatal injury. (App. D11) As he jumped, Mr. Ristow was struck in the left lower extremity by falling pipe and sustained severe injuries. (App. D11-14) Because of such injuries, he was required to undergo surgery and was unable to work for approximately one and one-half years. (App. D13)

The Ports Authority notified its insurance carrier, Lloyds of London, of the incident, and an insurance adjustment firm, Crawford and Company, of Charleston, South Carolina was retained to represent the Ports Authority and the insurance carrier. (App. D18-19; F2) A Crawford employee by the name of Lee Pitillo was assigned to handle this mat-

ter, and he led the Ristows to believe they could settle their claim for damages arising from the accident directly with Lloyds of London by dealing with him and without counsel. (App. D19; F2-3)

Subsequently, in July of 1990, the Ristows had a telephone conversation with Mr. Pitillo during which he offered to settle their claims for $75,000.00. (App. D19-20; F3) The Ristows accepted this offer and waited for the settlement check and paperwork to arrive. (App. D20-21; F3) Despite repeated reassurances by Mr. Pitillo, no settlement check ever arrived. (App. D21; F3) In December of 1990, the Ristows retained counsel to assist them with this matter.

C. PROCEEDINGS BELOW AND DISPOSITION

1. DISTRICT COURT

In December of 1991, the Ristows commenced this action in the U.S. District Court for the District of South Carolina, Charleston Division, against the Ports Authority and the unknown ship alleging ordinary negligence by the Ports Authority employee and vicarious liability for such negligence by the Ports Authority and the unknown ship.1 (App. D11-16) Mrs. Ristow's claim was for loss of consortium. (App. D16-18) The Ristows also asserted a breach of contract claim against the Ports Authority based upon the aforemention facts of the settlement agreement. (App. D18-22)

Federal jurisdiction was founded on diversity under 28 U.S.C. Sec. 1332 (a)

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1 The unknown ship was designated as "The SS Unknown," but the vessel was never identified and served.

and admiralty under 28 U.S.C. Sec. 1333. (App. D1-2) The parties consented to have the proceedings conducted before a U.S. Magistrate Judge pursuant to 28 U.S.C. Sec. 636 (c), and the case was assigned to the Hon. Robert S. Carr. (App. B1)

The Ports Authority moved for dismissal for lack of subject matter jurisdiction alleging, among other things, that the Ports Authority was an agency of the State of South Carolina and the suit was barred by the Eleventh Amendment of the U.S. Constitution. (App. E1-3) The Ristows argued the Ports Authority was not entitled to sovereign immunity based upon the application of the factors set forth by the Fourth Circuit in Ram Ditta v. Maryland National Capital Park and Planning Commission,

822 F. 2d 456 (4th Cir. 1987) The Ristows also urged the Court to adopt the reasoning of the District Court for the Southern District of New York expressed in Doris Trading Corporation v. The SS Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976) wherein the Court ruled the Ports Authority was not the alter ego of the State and therefore not entitled to sovereign immunity.

In an order entered on September 2, 1992, the District Court Magistrate Carr, presiding, granted the motion to dismiss holding that the Ports Authority was entitled to Eleventh Amendment immunity. (App. B5) The Court's decision was founded upon the cases of South Carolina State Ports Authority v. Seaboard AirLine R.R. Co., 124 F. Supp. 533 (D.S.C. 1954) and Coakley v. South

Carolina State Ports Authority, D.S.C. Case No. 2:87-1442-2 (UP 1988)2 as well as South Carolina statutory law concerning the Ports Authority and tort claims against the State. (App. B4 & 5) The claim against the unknown ship was dismissed due to a lack of service.3 (App. B5 & 6) A motion to alter judgment was subsequently denied (App. B7-9), and the Ristows then appealed.

2. COURT OF APPEALS

The United States Court of Appeals for the Fourth Circuit in an opinion by

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2 The Coakley decision is reproduced at App. G1-30.

3 The Ports Authority had also argued that it was not a citizen for diversity purposes and that the Ristows alleged only landside torts which did not fall within the admiralty jurisdiction. In light of its sovereign immunity decision, the Court did not address these other arguments.

the Honorable James M. Sprouse, Senior Circuit Judge, affirmed the District Court's dismissal of the action. (App. A1) The Fourth Circuit analyzed whether the Ports Authority was the alter ego of the State and was entitled to Eleventh Amendment immunity using the following four factors set forth in Ram Ditta: 1) whether the state treasury will be responsible for paying any judgment that might be awarded; 2) whether the entity exercises a significant degree of autonomy from the state; 3) whether it is involved in local versus statewide concerns; and 4) how the entity is treated as a matter of state law. (App. A6-7)

With respect to the first factor which it recognized as generally being the most important, the Court determined

the Ports Authority owes its existence and current position to funding by the State. (App. A7-9) The Court believed the State's withdrawal of excess Ports Authority funds and commingling of state funds with those of the Authority indicate that the Ports Authority's funds belong to the State and a recovery out of those funds would constitute one from the State treasury. (App. A10) The Court rejected the Ristows' argument that South Carolina statutory law insulated the state treasury from any Ports Authority indebtedness, including any judgment in favor of the Ristows. (App. A12-13)

The Fourth Circuit was not persuaded by the Ristows' assertions that the existence of insurance coverage, the absence of any obligation on the part of

the State to fund the Ports Authority or pay judgments against it, and the existence of the Ports Authority's own bank accounts and ability to borrow funds all weighed heavily against immunity. (App. A13-19) Although admitting the Ristows' arguments as to the existence of the Ports Authority's own funds and the absence of a provision committing the state treasury to fund the Authority or pay a judgment found support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grounds, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed 2d 264 (1990), the Court was persuaded by the Third Circuit's reasoning in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F. 2d

413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed 2d 370 (1987) (App. A14-16)

In the Police Benevolent Association case, the Third Circuit considered the status of the identical New York/New Jersey Ports Authority which the Second Circuit reviewed in Feeney and held that the symbiotic relationship between the states and the Authority supported a finding of Eleventh Amendment immunity. (App. A15-16) The Fourth Circuit favored what it described as the "broader" and "more practical" approach of the Third Circuit over that of the Second Circuit. (App. A17) Accordingly, the Court concluded the first factor of the Ram Ditta analysis supported Eleventh Amendment immunity. (App. A17)

As to the second Ram Ditta factor,

autonomy, the Court recited the considerable autonomous powers of the Ports Authority. (App. A20-22) However, it believed other statutory provisions made the Ports Authority beholden to the State and tipped this factor in favor of immunity. (App. A23) The Court determined the third factor with respect to involvement in state versus local concerns favored immunity because it believed the Ports Authority's functions extended to all regions of the State. (App. A24) The final prong of the analysis, the treatment of the entity as a matter of state law, was found to be inconclusive. (App. A25-26)

Two other factors also influenced the Court's decision. First, the District Courts for South Carolina in the aforementioned Coakley and Seaboard Air

Line cases held that the Ports Authority was entitled to immunity. (App. A26) Secondly, the Ports Authority is included in the South Carolina State Tort Claims Act, and the State has provided a state court forum for tort claims. (App. A26-27) The Fourth Circuit concluded the Ports Authority was the State's alter ego and thus was entitled to Eleventh Amendment immunity. (App. A27)4 The Court rejected the Ristows' admiralty argument as well. (App. A28-30)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

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4 Because the Court found the Authority was entitled to sovereign immunity protection, it did not have to address the diversity jurisdiction issue which the Ristows had also raised. (App. A27)

I. THE FOURTH CIRCUIT'S APPROACH IN ANALYZING THE IMPORTANT FINANCIAL FACTOR WITH RESPECT TO ELEVENTH AMENDMENT IMMUNITY HAS CREATED AND SHARPENED CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER APPROACH TO BE UTILIZED IN EXAMINING THIS FACTOR WHICH MUST BE RESOLVED BY THE SUPREME COURT.

A. GENERAL DISCUSSION OF ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment of the United States Constitution provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." By its terms, the protection of the Eleventh Amendment is available only to "one of the United States." See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-401,

99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979). While some agencies exercising state power have been permitted to invoke the Amendment to protect the state treasury from liability which would have had the same practical consequences as a judgment against the state, the Court has refused to extend immunity to political subdivisions even though they exercise a "slice of state power." Lake Country, 440 U.S. at 400-401.

In light of the foregoing, a question as to the applicability of immunity often arises in situations where a state is not named in the suit but the defendant entity has some type of relationship to the state or governmental character. A general test has evolved to analyze the immunity question in those situations. The Court must determine whether

the particular entity is the "alter ego" of the state or the state is the real substantial party in interest. See State Highway Comm'n of Wyoming v. Utah Constr. Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 (1929), Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945), and Edelman v. Jordan, 415 U.S. 651, 97 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

B. THE IMPORTANT FINANCIAL FACTOR

According to the Ford Motor Co. case, the critical inquiry in the alter ego/real party in interest analysis is whether the relief sought is relief against the state because "when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest

and is entitled to invoke its sovereign immunity from suit." Ford Motor Co., 323 U.S. at 464. The central goal of the Eleventh Amendment is to shield state treasuries from federal court judgments. Edelman, 415 U.S. at 663, Jacintoport Corp. v. Greater Baton Rouge Port Comm., 762 F. 2d 435, 440, (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) and Fitchik v. New Jersey Transit Rail Operations Inc., 873 F. 2d 655, 659-660 (3rd Cir. 1989), cert. den. 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989). Although the federal courts examine a number of factors in analyzing a sovereign immunity question, they generally agree that the most important factor is whether the state treasury will be responsible for paying any judgment

which might be awarded.5 The Fourth Circuit has concurred with this position in Ram Ditta, and in the case at hand.

C. CONFLICTING APPROACHES IN ANALYZING THE FINANCIAL FACTOR

While there is general agreement regarding the importance of the financial factor, the Ristows believe the Fourth Circuit's decision has created additional conflict and sharpened existing conflict among the Circuits as to precisely how the important financial factor should be analyzed. Two divergent approaches have evolved for analyzing the financial nexus which must exist between an entity and the state for the finan-

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5 See for example, Edelman, Jacintoport and Feeney, cited earlier; Miller-Davis v. Illinois State Toll Highway Authority, 567 F. 2d 323 (7th Cir. 1977); Blake v. Kline, 612 F. 2d 718 (3rd Cir. 1979), cert. den. 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980).

cial factor to favor sovereign immunity. These can be termed the "broad financial approach" and the "actual financial analysis".

The decision of the Third Circuit in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, cited earlier, illustrates the broad approach wherein the Court held that the symbiotic relationship between the Authority and the States of New York and New Jersey supported a finding of sovereign immunity. Those States had originally funded the Authority and provided a method for its financial independence. Police Benevolent Association, 819 F. 2d at 415-416. There was also a limited ability for the Authority to receive funds from the States to meet administrative expenses

in the event revenues were insufficient to cover expenses. Police Benevolent Association, 819 F. 2d at 416. However, the Authority could not pledge the credit of either State without its consent, and no provision committed the state treasuries to satisfy judgments. See Feeney, 873 F. 2d at 631.

Because the States had initially created and funded the Authority and had provided a limited appropriation of state funds, the Third Circuit believed the financial factor favored sovereign immunity regardless of whether the state treasuries would actually be responsible for the payment of a particular judgment. Police Benevolent Association, 819 F. 2d at 416. In its decision herein, the Fourth Circuit found the Third Circuit's approach in Police Benevolent

Association persuasive in determining the financial factor favored immunity. (App. A15-17.

The actual financial analysis approach is best seen in the decisions of the Second Circuit in Feeney, and the Fifth Circuit in Jacintoport, cited earlier. In both cases, the Courts examined whether, as a practical matter, the plaintiff's judgment would actually have to be satisfied from the state treasury.

The Jacintoport Court conducted a financial examination and concluded any judgment obtained by the plaintiff could be satisfied by the Commission itself. Jacintoport, 762 F. 2d at 441. Such analysis determined that even the most favorable estimate of the plaintiff's damages would not reach one-tenth of the Commission's surplus revenue in a good

year. Jacintoport, 762 F. 2d at 441. The state's tertiary liability on the Commission's bonds was found to have only an ancillary effect on the treasury. Jacintoport, 762 F. 2d at 441-442. The Court declined to address the situation where the size and nature of a judgment would result in liability for the state. Jacintoport, 762 F. 2d at 441.

In the Feeney case, the Second Circuit considered the sovereign immunity issue with respect the very same Port Authority which the Third Circuit had addressed previously in the Police Benevolent Association case. Unlike the Third Circuit, however, the Second Circuit determined that such entity was not entitled to sovereign immunity. Feeney, 873 F. 2d at 631.

The Feeney Court believed the financial factor favored the denial of immunity since the Authority could not pledge the credit of either state, could only borrow money in its own name, and no provision committed the state treasuries to satisfy any judgments. Feeney, 873 F. 2d at 631. The limited appropriation from the state treasuries requiring gubernatorial approval was felt to be a limited and optional obligation evidencing an intent to insulate the vast bulk of the treasury from the Authority's debts. Feeney, 873 F. 2d at 631.

Relying heavily on the reasoning of Feeney and Jacintoport cases among others, the Ristows argued that the state treasury was insulated from any judgment in their favor because of the potential

size of the judgment, the existence of insurance coverage and the Ports Authority's own separate funds, the presence of a provision insulating the State from Ports Authority indebtedness, and the absence of a continuing funding obligation on the part of the State. The Fourth Circuit admitted the Ristows' argument found support in the reasoning of the Second Circuit in Feeney. (App. A15)

In granting certiorari in Feeney to resolve the conflict between the Second and Third Circuits as to the New York/New Jersey Authority's status, the Supreme Court could have determined which of the two approaches to the financial factor was preferable. The Court, however, chose to affirm the Second Circuit on alternative grounds find-

ing that if the Authority is entitled to sovereign immunity such immunity has been expressly waived. See Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 306-309, 110 S. Ct. 1868, 19 L. Ed. 2d 264, 273-275 (1990). Thus, the conflict between the two approaches was not resolved. The Fourth Circuit's decision herein has created additional conflict by openly bringing another Circuit in conflict with those Circuits6 employing

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6 Having reviewed the Seventh Circuit's decision in Miller-Davis, cited earlier, and the First Circuit's in Royal Caribbean v. Puerto Rico Ports Authority, 973 F. 2d 8 (1st Cir. 1992), the Ristows are convinced these Circuits also employ the actual financial approach. Interestingly enough, in the subsequent cases of Fitchik, cited earlier and Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F. 2d 807 (3rd Cir. 1991), cert. den. ____ U.S. ____, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992), the Third Circuit itself now seems to have become more financially analytical in its view.

an actual financial analysis approach and by sharpening the existing conflict between the Second and Third Circuits which the Supreme Court attempted to alleviate by deciding the Feeney case on alternative grounds.

D. SUPREME COURT RULE 10 CONSIDERATIONS

Under Supreme Court Rule 10.1 (a), one of the criteria for granting a petition for certiorari is when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. The foregoing discussion has demonstrated the existence of a clear and open conflict between the Circuits as to the approach to be taken in addressing the most important factor in the alter ego equation. Since Eleventh Amendment immunity is an

important question of federal law and the factor involved is the most important factor in the alter ego equation, the conflict presents a substantial question and "special and important reasons" which would justify certiorari. See Supreme Court Rule 10.1 and Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 The case involves principles whose settlement is important to the public, and a conflict which is real. Accordingly, pursuant to NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed 479 (1951), certiorari is appropriate and necessary.

Other considerations also favor certiorari. The case does not involve a complex fact situation. No dispute exists as to the facts material to the

sovereign immunity issue, and the case thus presents an ideal vehicle for review. If there is no dispute over the facts, a determination of whether the District Court applied the proper standard in the case is a question of law and an appellate court may exercise independent judgment and enter its own legal conclusions. See United States v. Parke, Davis & Co., 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503, 512 (1960), later app. 365 U.S. 125, 5 L. Ed. 2d 457, 81 S. Ct. 433 (1961) and United States v. Singer Mfg. Co., 374 U.S. 174, 193, 10 L. Ed. 2d 823, 83 S. Ct. 1773, 1783 (1963), and Murphy v. Turner, 426 F. 2d 422, 423 (10th Cir. 1970).

Given the substantial number of cases arising in the Eleventh Amendment

area, the issue raised herein is not episodic but is frequently seen in the federal system. The Fourth Circuit's decision has also created a conflict over the respondent's status with the Southern District of New York in the Doris case. Throughout this litigation, the Ristows have believed Doris was correctly decided and should have been followed. Finally, as will be discussed in Part III, the Ristows' position has substantial merit.

Supreme Court Rule 10.1 (c) provides an additional reason for granting review herein. In light of the conflicting approaches utilized by the Courts of Appeals to analyze the financial factor in sovereign immunity matters, it is clear that this important question of federal law has not been settled by the Supreme

Court. The appellate courts simply do not have any definitive guidance from the Supreme Court as to the proper approach to be taken in analyzing the financial factor.

In his separate opinion in the aforementioned Port Auth. Trans-Hudson v. Feeney case, Justice Brennan alluded to the problem in a footnote when he stated "this Court has not decided which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest for Eleventh Amendment purposes." Feeney, 495 U.S. at 317-318, 109 L. Ed. 2d at 280. While Justice Brennan, joined by Justices Marshall, Stevens and Blackmun, concurred in the Court's judgment, they did not feel the Authority's consent to suit was neces-

sary because they believed the Authority was not entitled to Eleventh Amendment immunity. Feeney, 495 U.S. at 309-318, 109 L. Ed. 2d at 275-281. The case at hand presents the Court with the perfect opportunity to resolve this question.

In view of the foregoing considerations, the Supreme Court should grant certiorari in this matter. The Ristows will now discuss why the actual financial analysis approach utilized by them is proper in addressing the financial factor. Finally, they will outline the merits of their sovereign immunity position.

II. AN ACTUAL FINANCIAL EXAMINATION OF THE CIRCUMSTANCES OF THE CASE IS THE PROPER APPROACH TO BE UTILIZED IN ASSESSING THE IMPORTANT FINANCIAL FACTOR IN AN ELEVENTH AMENDMENT IMMUNITY ANALYSIS.

As discussed earlier on page 21, the

central goal of the Eleventh Amendment is to shield states' treasuries. Thus, suits by private parties seeking to impose a liability which must be paid from the state treasury are barred by the Eleventh Amendment. Edelman, 415 U.S. at 663. In Jacintoport, the Fifth Circuit noted that "the purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state." Jacintoport 762 F. 2d at 440.

Consistent with such purpose, the actual financial analysis approach examines the actual circumstances, i.e. the size of the possible judgment, the entity's resources, and the funding obligation of the state, to determine whether the plaintiff's judgment would be paid from the state treasury. The broad ap-

proach, however, focuses more on how the entity was created and where its funding originated; it does not take a realistic look at the circumstances then and there existing. Thus, the broad approach favors immunity in situations where there is absolutely no possibility the state treasury would have to pay a judgment as is the case herein. Accordingly, the broad view is not consistent with the real purpose of the Eleventh Amendment and should be rejected by the Court.

As demonstrated by the facts of this case, the broad view also has the undesirable effect of conferring the benefits of sovereign immunity upon an entity, Lloyds of London Insurance Company, which is not the State or even remotely connected with the State in any way. The Amendment, by its very language,

limits immunity to only "one of the United States." Lake Country, 440 U.S. at 400. Thus, municipal corporations or bodies politic similar to cities, townships and counties do not enjoy Eleventh Amendment immunity. See Port of Seattle v. Oregon & W.R. Co., 255 U.S. 56, 71, 65 L. Ed. 500, 41 S. Ct. 237, 242 (1921); Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568, 572 (1977); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 55 L. Ed. 890, 31 S. Ct. 654, 657 (1911), and Lake Country.

By concentrating on symbiotic relationships, origins, and the like, instead of conducting an actual financial analysis, the broad view extends the scope of sovereign immunity far beyond

its intended boundaries. An actual financial analysis, on the other hand, avoids this problem since the existence of insurance coverage is one component in the overall analysis as to whether the state treasury will have to pay a judgment. Because it is entirely consistent with the scope and purpose of the Eleventh Amendment, the actual financial analysis approach must be preferred to the broad view in analyzing the financial factor in the alter ego equation.

III. WHEN CORRECTLY ANALYZED, THE PORTS AUTHORITY IS CLEARLY NOT ENTITLED TO ELEVENTH AMENDMENT PROTECTION.

A. THE IMPORTANT FINANCIAL FACTOR

Using an actual financial analysis approach, it is clear that any judgment entered in favor of the Ristows would not be paid from the South Carolina

state treasury because of the following facts:

1) the existence of liability insurance coverage through Lloyds of London;

2) the existence of a statutory provision insulating the State from Ports Authority liabilities;

3) the absence of a continued funding obligation on the part of the State for the Authority or a provision compelling it to pay the respondent's judgments.

4) the fact that the Ports Authority has its own separate funds and can raise funds;

Let us now discuss these tiers of protection.

1. INSURANCE COVERAGE

On their personal injury claims, the maximum amount the Ristows could recover is the sum of $430,000.00 plus costs, while they could recover $75,000.00 plus costs on their alternative breach of contract claim.7 Presumably, an entity with activities as extensive as the Ports Authority has ample coverage through Lloyds to cover such a claim. At no point, did the Authority claim there was insufficient coverage. Since a settlement offer of $75,000.00 was previously made, it is reasonable to assume coverage at least equal to such amount existed. The possibility of any liability beyond policy limits appears remote.

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7 These are the amounts of damages prayed for by the Ristows in their complaint. See App. D22-23

Despite the Ristows' extensive arguments as to insurance coverage, the Fourth Circuit essentially ignored this matter and concentrated instead on the symbiotic relationship of the Authority and the State. (App. A13-19) By adopting the so-called broad view, the Fourth Circuit has given Lloyds what amounts to a free ride in this case. Clearly, the Eleventh Amendment did not intend to extend the protection of sovereign immunity to private insurance carriers. If the Court was legitimately concerned about the exposure of the state treasury, the Ristows cannot understand why the Fourth Circuit simply did not deny immunity for judgments at least to the extent of insurance coverage. In the aforementioned Royal Caribbean, Fitchik, and Bolden cases, the ex-

istence of insurance coverage was a key factor in denying immunity. Here the Fourth Circuit inexplicably ignored it.

2. THE INSULATION PROVISION

Assuming for the sake of argument, however, that the Ristows' recovery exceeded policy limits, the other tiers of protection insulate the state treasury from any judgment in favor of the Ristows. First, the language of S.C. Code Ann. Sec. 54-3-140 (9) insulates the state treasury from any liability for Ports Authority indebtness. It provides as follows:

> "[the Authority] may apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebted-

> ness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof." Emphasis added. See App. C10-18 for text of entire statute.

The Fourth Circuit interpreted this provision as being applicable only to federal indebtedness because of its placement and the Court's reference to other statutes. (App. A12-13) Although the insulation provision is contained in a section discussing federal indebtedness, the plain language (i.e. "no indebtedness of any kind") utilized by the General Assembly demonstrates a clear legislative intent to insulate the state treasury from all types of indebtedness

and not merely those of a federal nature. If the legislature desired to impose such a limitation on the provision, it would have selected other language such as "no federal indebtedness of any kind", "no federal indebtedness" or "no indebtedness of that kind".

To support its interpretation, the Court noted the absence of any cross-reference to Sec. 54-3-140 (9) in Sec. 54-3-140 (2) empowering the Authority to mortgage or lease property and in Sec. 54-3-1010 authorizing the Authority to issue bonds. (App. A13) No cross-reference is needed however since the language of Sec. 54-3-140 (2) and Sec. 54-3-1010 clearly indicates the party acting as mortgagor, borrower, or lessor is the Ports Authority alone. Thus, parties doing business with the Author-

ity know they are dealing with the Authority and can seek payment only from it, absent some written guarantee of the liability by someone else. In Doris, the Southern District of New York agreed with the Ristows' interpretation of Sec. 54-3-140 (9). Doris, 406 F. Supp. at 1095-1096. Like the situation in Feeney, the South Carolina state treasury is protected from any judgments by definitive statutory language.

3. THE ABSENCE OF A CONTINUED FUNDING PROVISION

The absence of any provision requiring the State to fund the Authority or pay its judgments furnishes the next tier of protection. In Feeney there was an optional obligation to fund the entity, and the Second Circuit found the state treasuries to be insulated from

authority indebtedness. Feeney, 873 F. 2d at 631. Here, no provision of any kind compels the State to fund the Authority or pay anything on its behalf. In Jacintoport, the State of Louisiana had tertiary liability for the port board's indebtedness, but the Court determined the treasury was protected. Jacintoport, 762 F. 2d at 441-442. Here, no liability of any kind on the part of the State exists. South Carolina's state treasury is even more insulated than its counterparts in New York, New Jersey, and Louisiana.

Should state treasury funds be used to pay a judgment in the Ristows' favor, or meet a budgetary shortfall, such payment would be purely voluntary. The purpose of the Eleventh Amendment, however, is to protect the state treasury

against involuntary liability. See Duckworth v. Franzen, 780 F. 2d 645, 650-651 (7th Cir. 1985) Voluntary payments by the state clearly do not trigger immunity. See Fitchik, 873 F. 2d at 661; Bolden, 953 F. 2d at 819.

4. SEPARATE FUNDS

The existence of the Ports Authority's own assets and its ability to generate funds provides the final prong of protection for the State. The Ports Authority has its own bank accounts and owns property in its own name. See S.C. Code Ann., Sec. 54-3-140 (2) and 54-3-1020 at App. C11, 52-53. The Ports Authority can generate funds in a variety of ways some of which are as follows:

1) licensing fees; S.C. Code Ann., Sec. 54-3-140 (14) at App. C17-18;

2) rent; S.C. Code Ann., Sec. 54-3-140 (2) at App. C11;

3) borrowing; S.C. Code Ann., 54-3-140 (2) and (9) at App. C11, 14-15;

4) funds from the counties of Beaufort, Charleston, and Georgetown; S.C. Code Ann., 54-3-130 (5) at App. C8-9;

5) funds from others; S.C. Code Ann., Sec. 54-3-1030 at App. C53.

The Ports Authority has generated considerable revenue having distributed excess earnings of $1,500,000.00 to the State. (App. A9) Thus, the Ports Authority clearly has its own separate funds and the ability to raise funds out of which any judgment in favor of the Ristows exceeding insurance coverage

could be paid. In Miller-Davis, the existence of a special segregated highway fund held by the state treasurer out of which the plaintiff's judgment would be paid was critical in denying Eleventh Amendment immunity for a state highway authority. Miller-Davis, 567 F. 2d at 327. A provision disclaiming bond liability by the state and the absence of a continued funding requirement were also key factors in the Miller-Davis decision. Miller-Davis, 567 F. 2d at 327 & 328. The entities in Bolden and Royal Caribbean also had their own funds and the ability to raise funds. Bolden, 953 F. 2d at 819 and Royal Caribbean, 973 F. 2d at 10 and 11.

On page 7 of its opinion, the Fourth Circuit claimed that the borrowing power of the Ports Authority is substantially

circumscribed pursuant to Sec. 54-3-1010 relating to the issuance of bonds for particular purposes. (App. A18) However, Sec. 54-3-140 (8) gives the Authority broad power to pay reasonably necessary costs and expenses, and Sec. 54-3-140 (2) allows it to mortgage real and personal property. (App. C11, 14) The Ports Authority has a sufficiently broad power to pay expenses.

The Fourth Circuit afforded considerable weight to the State's initial funding of the Ports Authority, but it admits the Authority is now self-sufficient. (App. A17-18) The Court also attached significance to the ability of the General Assembly to reach excess Ports Authority revenues under Sec. 54-3-1020 and the transfer of funds to the Ports Authority for use in the BMW

transaction. (App. A18-19) Under the actual financial analysis approach, none of these considerations are relevant since an actual financial assessment reveals that the state treasury would not be responsible for the payment of the Ristows judgment.

Aside from the irrelevance aspect, these considerations and the Court's symbiotic relationship approach ignore some very elemental principles of common law. In appropriating funds for the initial funding of the Authority and for projects such as the BMW transaction, the General Assembly authorized a legal separation of treasury funds from the state treasury. Article X, Sec. 8 of the South Carolina Constitution indicates that money may be withdrawn only in pursuance of appropriations made by

law. By enacting Chapter 54 of the South Carolina Code, the Assembly created a legally separate entity which owns real and personal property under Sec. 54-3-140 (2). (App. C11) Sec. 54-3-1020 indicates that funds deposited by the Authority in a bank are "funds of the Authority." (App. C52) Legal title of the assets is definitely with the Ports Authority and not the State.

Aside from marital property or community property considerations, legal title is normally determinative of the ownership of assets. Thus, once the Assembly has made a legal separation of funds from the state treasury, they cease to be a part of the treasury and are the property of the Authority. Legislative approval is also needed to pay any excess revenues to the state treas-

ury under Sec. 54-3-1020. The symbiotic relationship approach utilized by the Fourth Circuit ignores the legal realities surrounding the legal separation of contributions from the state treasury and the ownership of assets by the Ports Authority.

While there is no denying the State's contributions to the Ports Authority and its ability to withdraw excess earnings, one must remember the criteria in question is not whether the State has contributed or has access to Authority funds but whether a judgment will have to be paid from the State treasury. In Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), the state had made significant financial contributions to a school

board but the Court denied sovereign immunity. In Miller-Davis, the state had the right to receive any surplus funds upon dissolution of the toll authority, but the Seventh Circuit denied immunity for reasons discussed earlier. See Miller-Davis, 567 F. 2d at 327-328.

In the case at hand, the Ristows have shown the existence of the Ports Authority's own legally separate funds and the ability to raise funds. This final tier of protection, coupled with the other three prongs, guarantees that no judgment in their favor would have to be paid from the state treasury. The important financial factor weighs heavily against immunity for the Authority.

B. AUTONOMY

In addressing the second of the Ram Ditta factors, i.e. whether the entity

exercises a significant degree of autonomy from the state, the Fourth Circuit believed the considerations were mixed. (App. A23) On the one hand, the Ports Authority has considerable autonomous powers such as the power to sue and be sued, to make contracts, to pay its costs and expenses, to hire and fire employees at will, to rent and purchase property, etc. (App. A20-22) The Court admitted the Ports Authority has considerable control over its day-to-day operations. (App. A22-23)

On the other hand, the Fourth Circuit noted the absence of a formal corporate charter, the appointment of the board of directors by the governor with confirmation by the senate, the Ports Authority's immunity from taxes and the inclusion of its employees in the state

retirement system and the state worker's compensation plan. (App. A21-23) The Court believed the Ports Authority was beholden to the State. (App. 23) Ultimately, the balance of the factors led the Court to conclude the Ports Authority answers to the State and is not autonomous for Eleventh Amendment purposes. (App. A23)

In reviewing the Fourth Circuit's reasoning, one can see it is confusing autonomy with accountability. Certainly, the Ports Authority is responsible to the State just as the officers and directors of ordinary business corporations are to their shareholders. Such accountability does not negate the autonomy of the Ports Authority as demonstrated by the independent powers possessed by it.

In the aforementioned Jacintoport case, the Fifth Circuit was presented with a similar situation where the Baton Rouge port board commissioners served at the pleasure of the governor. Jacintoport, 762 F. 2d at 442. The Fifth Circuit, however, was concerned with analyzing the port board's independent management authority rather than the independence of the individual commissioners. Jacintoport, 762 F. 2d at 442. In Jacintoport, the Court found the commission had great latitude to manage itself without additional approval. Jacintoport, 762 F. 2d at 442. When the autonomy factor is considered under the approach utilized in Jacintoport witn the autonomy/accountability distinction in mind, this factor strongly favors a finding of no sovereign immunity in this

case.

C. STATE VERSUS LOCAL CONCERNS

As to the third factor, i.e. whether the Authority is involved primarily with state or local concerns, the Fourth Circuit had little trouble concluding the Ports Authority's functions extend beyond the coast to affect all regions of the State. (App. 24) The Ristows respectfully disagree.

A review of the applicable statutory provisions shows a limited scope of jurisdiction. Sec. 54-3-110 allows the Authority to develop and operate seaports within the State, namely Charleston, Georgetown and Port Royal. (App. C5-6) The Ports Authority's jurisdiction covers the waters and shores of the State's seaports, over streams flowing into such seaports and extends to the

outer edge of the outer bar at such seaports. See Sec. 54-3-120 at App. C6. Under Sec. 54-3-130, the Ports Authority's purposes are limited to the coastal areas of South Carolina. (App. C6-10)

D. TREATMENT AS A MATTER OF STATE LAW

As to the Ports Authority's treatment as a matter of state law which is the final prong of the Ram Ditta test, the Fourth Circuit determined the state's view of the Authority's status is at best inconclusive. (App. 25-26) The Ristows agree with that conclusion.

E. OTHER FACTORS

In making its decision, the Fourth Circuit was also influenced by two other factors. First, the federal district courts in South Carolina held that the Ports Authority is entitled to Eleventh Amendment immunity in the cases of Sea

board Air Line and Coakley cited earlier. (App. 26) As the Ristows discussed in their briefs, the Southern District of New York in Doris pointed out the deficiencies of the 1954 Seaboard Air Line decision. Doris rejected the Seaboard Air Line decision because the latter was based upon the governmental nature of the Authority's activities and did not examine the relationship between the Ports Authority and the State. Doris, 406 F. Supp. at 1095. An alter ego analysis was felt to be necessary by the Southern District of New York because "if the Authority is not an 'alter ego' of the state, the fact that it is performing governmental functions has no bearing upon the question of whether it

is cloaked by the Eleventh Amendment,8 for 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work'."9 Doris, 406 F. Supp. at 1095.

The second factor which influenced the Court's decision was the existence of a state court forum for the Ristows' claims against the Ports Authority. (App. 26-27) However, the existence or non-existence of a state court forum

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8 Cases cited by Doris on this point: Bowen v. Hackett, 387 F. Supp. 1212, 1220 (D.R.I. 1975); Gordenstein v. University of Delaware, 381 F. Supp. 718, 723 (D. Del. 1974); Raymond Int'l v. M/T Dalzelleagle, 336 F. Supp. 679, 682 (S.D.N.Y. 1971); Lowes v. Pennsylvania Turnpike Comm'n, 125 F. Supp. 681 (M.D. Pa. 1954)

9 Case cited by Doris on this point: Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388, 83 L. Ed. 784, 59 S. Ct. 516 (1939)

simply is not a relevant factor in the alter ego/real party in interest analysis. Neither of these other factors cited by the Court supports a finding of sovereign immunity for the Ports Authority.

F. SUMMARY

When the important financial factor is properly analyzed using the actual financial analysis approach, such factor weighs heavily in favor of denying Eleventh Amendment immunity for the Ports Authority. The independent management authority of the respondent likewise tips the autonomy factor in favor of the denial of immunity. Finally, the Authority's statutory jurisdiction shows its concerns to be primarily local. The merits of the Ristows' arguments against sovereign immunity are substantial and

mandate reversal of the Fourth Circuit if certiorari is granted.

CONCLUSION OF PETITION

In this petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case. They have also shown their sovereign immunity position to be correct. For the reasons recited in this petition, the Ristows' petition for certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

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